

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**TAX APPEAL No.629 of 2005****For Approval and Signature:****HONOURABLE MR.JUSTICE D.A.MEHTA****Sd/-****HONOURABLE MS.JUSTICE H.N.DEVANI****Sd/-**

1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

BHAGWANDAS BABIDAS PATEL - Appellant(s)**Versus****DEPUTY COMMISSIONER OF INCOME TAX - Opponent(s)****Appearance :****MR SN DIVATIA for Appellant(s) : 1,****MR MANISH R BHATT for Opponent(s) : 1,****CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA****and****HONOURABLE MS.JUSTICE H.N.DEVANI****Date : 20/09/2005****ORAL JUDGMENT****(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)**

1. The appellant-assessee has proposed the following four questions:

- A) Whether on the facts and in the circumstances of the case, Income-tax Appellate Tribunal, was right in law in confirming the addition of Rs.16,60,972/- made by the Assessing Officer as undisclosed business profit of the Block Period?
- B) Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in confirming that the surplus in respect of land transaction was assessable under the head "Profits and Gains of business and profession" instead of "Capital gains" ?
- C) Whether on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal, was right in law in confirming, without taking into consideration relevant material and essential facts, the addition made by the Assessing Officer of Rs.16,60,972/- as undisclosed business profit assessable within the block period ?
- D) Whether on the facts and circumstances of the case, the Income Tax Appellate Tribunal was right in law in holding that there was "Transfer" of land in the block period ?

2. After hearing Mr.S.N.Divatia notice was issued and in response thereto Mr.M.R.Bhatt, learned Senior Standing Counsel, appears on behalf of the opponent-revenue. After hearing the learned counsel for the respective parties, with consent, the appeal is taken up for final hearing and disposal in light of the facts narrated hereinafter. Hence, ADMIT.

3. The following substantial question of law arises for determination.

“Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was justified in law in holding on the one hand that “there is no need to examine whether transfer has taken place or not,” and yet in the same breath holding that transfer of land had taken place during the block period ?

4. The assessment pertains to block period

commencing on 1st April, 1986 and ending on 11th February, 1997. Search and seizure proceedings took place on 11th February, 1997 at the business premises of one Shyam Builders, and a banakhat (Agreement to Sell) dated 6th November, 1996 was found and seized as per Annexure-A/2-14 relating to land admeasuring 90,000 sq. yards bearing Survey Nos.191, 192, 193, 199, 201 and 202 of Block Nos.187, 190, 191, 193 to 195 of Village Muthiya, Taluka Daskroi, District Ahmedabad. The said document revealed that the assessee-appellant was one of the vendors having 1/4th share and the aggregate consideration for the entire parcel of land was fixed at Rs.2,70,90,000/-. The payment was to be made in installments over a period from 15th March, 1996 to 15th December, 1996. In the statement of the assessee, recorded on 11th February, 1997, it was stated that

Rs.1.01 crores had been received upto the date of search. It is the assessee's case that subsequently the parties to the agreement renegotiated the terms and arrived at an understanding that possession of 33,555 sq. yards of land should be handed over to the purchaser which was in proportion to the amount of Rs.1.01 crores received by the assessee along with other executors of the agreement. Simultaneously, the agreement in relation to the balance land was terminated.

5. The respondent, while framing assessment for the block period, issued show cause notice to the assessee calling upon the assessee to explain why the amount of Rs.16,90,972/- should not be treated as profit from business instead of capital gains arising on account of sale of land. The assessee's

objection was brushed aside and it was held that the amount was undisclosed business income from the sale of land. The Assessment Order dated 22nd February, 1999 framed under Section 158BC read with Section 143(3) of the Income-tax Act, 1961 (the Act) was challenged by way of appeal. The Commissioner (Appeals) vide his order dated 11th August, 2000 confirmed the Assessing Order treating the amount of Rs.16,60,972/- as business income.

6. The assessee went in second appeal before the Tribunal. By order dated 31st January, 2005 the Tribunal dismissed the appeal of the assessee. After elaborate discussion as to why the surplus arising in hands of the assessee should be treated as income from Profits & Gains from Business and Profession, the Tribunal declined to examine

and deal with the contention raised on behalf of the assessee that there was no transfer of land during the block period; that in fact the sale took place subsequent to the block period and even possession was handed over subsequently in point of time. The findings of the Tribunal in this regard read as under:

“The next contention of the assessee is that no transfer of land has taken place within the meaning of “transfer” provided in Section 2(47) of the Act, because neither the possession was handed over nor the sale deed was executed. Therefore, no capital gain tax is even leviable. We do not find any merit in this contention because we have already held that the income from this land transaction is required to be assessed under the head **“Profit & Gains of Business and Profession”**. Therefore, there is no need to examine whether transfer has taken place or not. The Vendees have made payment to the

assessee till the end of December-1996, i.e. prior to search and to that extent sale-deed has been executed, though subsequently, but the income from the transaction has already accrued to the assessee. Therefore, it is required to be assessed in the block period."

7. The facts narrated hereinbefore reveal that the assessee had all along contended, right from inception, that no transaction transferring the land had taken place during the block period so as to bring any amount to tax from such a transaction in the block period. Both the Assessing Officer and the Commissioner (Appeals) had negatived the said contention. However, the Tribunal, for some strange inexplicable reasons, has thought it fit to state that there was no need to examine whether transfer has taken place or not. It appears that the Tribunal lost sight of the basic requirement: i.e. whatever may be the property, immovable or

movable, transfer and delivery, are a must for any profit or surplus to arise, regardless of the head under which such profit or surplus is brought to tax. In the present case, admittedly, the question has arisen in context of land, an immovable property. Without the transfer being complete there could be no surplus arising, either under the head "Profits & Gains of Business and Profession" or under the head "Capital Gains". The Tribunal has adopted an illogical method of reasoning after accepting that sale deed had been executed subsequently. It is stated that the assessee had received payment till end of December, 1996 i.e. prior to the date of search and to that extent income from the transaction had already accrued to the assessee though the sale had been executed subsequently. Once this fact, of sale being subsequent in point

of time, was accepted by the Tribunal it was necessary for the Tribunal to have applied its mind to the issue raised by the assessee.

8. The Tribunal apparently appears to have overlooked the provisions of Section 54 of the Transfer of Property Act, 1882 (TP Act) as well as Section 47 of the Registration Act, 1908. Under Section 54 of the TP Act the term "sale" has been defined and it is laid down that in case of tangible immovable property of the value of one hundred rupees and upwards the sale can be made only by a registered instrument. Therefore, the document effecting such a sale has to be registered. On reading of Section 47 of the Registration Act it becomes clear that a registered document shall operate from the time from which it would have commenced to

operate if no registration thereof had been required to be made, and not from the time of its registration. Therefore, under the general law this is the position.

9. Section 2(47) of the Act defines the term “transfer” and under Clause (v) it is provided:

“any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882); or”

Therefore, even if one takes the extended meaning of the term “transfer”, yet it is necessary for the fact finding body to record as to whether the transaction involved, in the first instance, allowing of possession to the purchaser in part performance of the contract of the nature

referred to in Section 53A of the TP Act. As already noticed hereinbefore, the Tribunal has singularly failed to apply its mind to any of these aspects, despite categorical assertion on behalf of the assessee that no transfer of land had taken place within the meaning of "transfer" as provided under Section 2(47) of the Act.

10. On going through the entire order of Tribunal it appears that the Tribunal was not aware of the controversy which was brought before it by the assessee, what were the factors which were relevant for determination of the said controversy. In these circumstances, the Tribunal has not recorded any finding as to whether any transaction of land had taken place either within the meaning of the term "transfer" as defined in Section 2(47) of the Act or even under general law.

11. In these circumstances, the impugned order of the Tribunal cannot be allowed to stand. The same is, accordingly, quashed and set aside. The appeal of the assessee-appellant viz. IT(SS)A No.128/Ahd/2000 is restored to file. The Tribunal shall decide the said appeal after giving reasonable opportunity of hearing to both the sides.
12. The question is, accordingly answered. The Tribunal had, therefore, erred in holding that there was no need to examine whether any transfer had taken place or not, and without examining the same could not have held that transfer had taken place within the block period.
13. It is made clear that this being the preliminary issue, as the entire order is quashed and set aside, it will be open to

both the sides to raise all other issues and it will be necessary for the Tribunal to determine all such issues as may be raised before it in accordance with law.

14. The appeal is, accordingly allowed. There shall be no order as to costs.

[D.A. MEHTA, J] [H.N. DEVANI, J]

*Bhavesh**